Supreme Court U.S.
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01-1862

In The
Supreme Court of the United States

JEANNE WOODFORD,
WARDEN OF SAN QUENTIN STATE PRISON
Petitioner,
v.

ROBERT F. GARCEAU,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Dated: December 16, 2002

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BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS* CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS*[1]

The Association of the Bar of the City of New York ("the Association") is a professional association of approximately 21,000 attorneys. Much of the Association's work is accomplished through approximately 180 committees. One of these is dedicated to issues related to capital punishment. This attention to the death penalty reflects the fact that the justice system can do nothing more consequential than to take a life. Thus, the Association has long been concerned with the death penalty and has taken the lead in analysis of resulting practical and legal issues. *See, e.g.*, Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 Record Assoc. Bar 129 (2000); Committee on Civil Rights, *Legislative Modification of Habeas Corpus in Capital Cases*, 44 Record Assoc. Bar 848 (1989); Committee on Civil Rights, *The Death Penalty*, 39 Record Assoc. Bar 419 (1984).

With the attached consent of the parties, the Association as *amicus curiae* is filing this brief for a limited purpose: We urge this Court to reject the suggestion made by another *amicus*, the Criminal Justice Legal Foundation, that this Court overrule its decision in *McFarland v. Scott*, 512 U.S. 849 (1993), and limit the time within which capital defendants in

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[1] Pursuant to Rule 37.6, this brief was authored, prepared and paid for in its entirety by the Association of the Bar of the City of New York.

state court can move for stay of execution. The issue was not fairly subsumed within the question presented to this Court, and adopting the Foundation's suggestion would unnecessarily restrict the ability of federal courts to stay the execution of capital defendants in state court.

ARGUMENT

THIS COURT SHOULD NOT CONSIDER THE QUESTION OF THE TIMELINESS OF MOTIONS FOR STAYS OF EXECUTION UNDER 28 U.S.C. § 2251

In a highly unusual move, the Criminal Justice Legal Foundation as an *amicus* made a suggestion to this Court (at the very end of its brief, at pp. 21-25) asking this Court to go far beyond the question presented and to adopt a new rule relating to death penalty filings. The Foundation suggested that this Court overrule *McFarland v. Scott,* 512 U.S. 849 (1993), which held that a request for counsel by a capital defendant in state court and a request for a stay of execution under 28 U.S.C. § 2251 may be made before the formal filing of a *habeas* corpus petition under 28 U.S.C. § 2254. The Foundation urged this Court to adopt what it called "a single commencement date" for *habeas* petitions (which would not be uniform in any event since it is clear that 21 U.S.C. § 848(q)(4)(B) requires a different timetable for appointment of counsel in such cases).

There is no merit in the Foundation's argument. Among other reasons, Congress did not alter this Court's *McFarland* holding when it passed the AEDPA, even though it totally revised the procedure

for filing *habeas corpus* petitions. The timetable for motions under Section 848 and 2251 (both of which predated the AEDPA) remains the same pursuant to this Court's ruling in *McFarland*, and they were not modified by Congress, indicating Congressional approval of the timetable already established in *McFarland*.

More importantly, here it is inappropriate for the *amicus*, or a party for that matter, to go so far beyond the limits of the question presented to this Court in this case. That question was a simple one: "What is the correct triggering date for application of the AEDPA for capital cases."

The question of when a motion for a stay of execution and a request for counsel must be made is in no way subsumed within that question. This Court has emphasized that new questions should not be examined by this Court, particularly if the issues were not considered below. "These arguments were not presented to the courts below. They are not expressly among the questions presented in the petition for certiorari and are only arguably subsumed by the questions presented." *McCormick v. United States*, 500 U.S. 257, 269 n. 6 (1991).

The issue of when a request for counsel or a request for a stay of execution must be filed cannot be considered even arguably within the question presented here. In this case, Respondent filed his request for a stay of execution and for counsel before the filing of the *habeas corpus* writ, in accordance with this Court's decision in *McFarland*. *See* decision below, *Garceau v. Woodford*, 275 F.3d 769, at 772. No issue was raised concerning the timeliness of those

filings and therefore there is no "case or controversy" concerning that issue. It was only because the *habeas* petition was filed after the AEDPA went into effect that any issue of timeliness is present. With no argument or lower court consideration, we respectfully submit that it would be inappropriate to consider the overruling of such a "life and death" precedent such as *McFarland*.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: 16 December 2002
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